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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Bonne Bell, Inc.

v.

Smack, Inc.

Opposition No. 121069
to application Serial No. 75609626
filed on December 21, 1998

Before Hanak, Hairston and Walters, Administrative Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge:

Smack, Inc. (applicant) seeks to register SMACK in typed drawing form for, among other goods, cologne. The intent-to-use application was filed on December 21, 1998.

Bonne Bell, Inc. (opposer) filed a timely Notice of Opposition alleging that it is the owner of various registrations of the mark SMACKERS for a wide array of goods. In particular, opposer claimed ownership of Registration No. 1,852,840 which purportedly shows that the mark SMACKERS is registered in typed drawing form for, among other goods, cologne. Indeed, opposer attached to its Notice of Opposition filed on October 16, 2000 a U.S.

Trademark Electronic Search System (TESS) printout of this registration. The TESS printout was obtained on October 10, 2000. Continuing, opposer alleged that if applicant were to utilize SMACK on goods (cologne) identical to the goods on which opposer had previously used the mark SMACKERS, this would result in a likelihood of confusion. While opposer did not make specific reference to Section 2(d) of the Trademark Act, it is clear that this is the basis for the Notice of Opposition.

Applicant filed an answer in which it denied that opposer was the owner of any registrations for the mark SMACKERS (or variations thereof). In addition, applicant denied that its use of SMACK would cause any confusion with opposer's use of its mark SMACKERS (or variations thereof).

The record in this case is, to say the least, sparse. Opposer filed a brief. Applicant did not. Neither party properly made of record evidence. Accordingly, the opposition must be dismissed for opposer's failure to prove its case.

Obviously, the last two sentences deserve some explanation. The only evidence which opposer attempted to make of record was attached to its Notice of Opposition. This consisted of TESS printouts of what purport to be registrations and applications owned by opposer for the

mark SMACKERS or variations thereof, such as LIP SMACKERS. The most pertinent of these registrations is Registration No. 1,852,840 for the mark SMACKERS in typed drawing form. This mark is the most pertinent because it covers, in part, goods (cologne) which are identical to certain of the goods set forth in the opposed application.

Trademark Rule 2.122(d) provides that "a registration of the opposer … pleaded in an opposition will be received in evidence and made part of the record if the opposition … is accompanied by two copies (originals or photocopies) of the registration prepared and issued by the Patent and Trademark Office showing both current status of and title to the registration." There is no dispute that the U.S. Trademark Electronic Search System (TESS) is an official database of the United States Patent and Trademark Office. However, an opposer simply cannot access this database, print out a copy of its registration and attach such printout to its Notice of Opposition in order to properly make of record the registration. Such a printout from the TESS database is simply not a "registration prepared and issued by the Patent and Trademark Office." Therefore, as previously noted, because opposer has not properly made of record any evidence in this proceeding, the opposition must be dismissed.

One final comment is in order. On October 2, 2002 this Board issued a Show Cause Order pursuant to Trademark Rule 2.128(a)(3) asking why judgment should not be entered against opposer because opposer had failed to file a main brief in this matter. On October 16, 2002 opposer filed a timely response to the Board's Order of October 2, 2002 explaining that it was not conceding this case. Indeed, attached to opposer's response of October 16, 2002 was a main brief in behalf of opposer.

In issuing a Show Cause Order pursuant to Trademark Rule 2.128(a)(3) this Board does not review the record to ascertain whether opposer has properly made of record evidence. To the extent that opposer incurred an expense in preparing a main brief in response to this Board's order of October 2, 2002, this Board acknowledges that such expenditure was unfortunate. However, it was simply not practical for this Board -- prior to issuing a Show Cause Order pursuant to Trademark Rule 2.128(a)(3) -- to review the opposition file to ascertain whether or not opposer had properly made of record evidence.

Decision: The opposition is dismissed for opposer's failure to properly make of record any evidence in support of its case.